NOT TO BE INCLUDED
IN BOUND VOLUMES

LPH
Huntington Park, CA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

COVENANT CARE, LLC d/b/a
HUNTINGTON PARK NURSING AND
REHABILITATION
Employer

Case 21-RC-21140

and

SEIU, SERVICE EMPLOYEES
INTERNATIONAL UNION
Petitioner

DECISION AND CERTIFICATION OF REPRESENTATIVE

The National Labor Relations Board[1] has considered objections to an election held July 7, 2009, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 56 votes for and 16 against the Petitioner, with 1 challenged ballot, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's

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[1] The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

findings[2] and recommendations as modified below, and finds that a certification of representative should be issued.

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[2] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We have carefully examined the record and find no basis for reversing the findings.

In response to the Employer's exceptions, we correct three minor misstatements in the hearing officer's report, none of which affects our findings as to the objections, all of which we overrule. (1) With respect to the list-keeping objections, Employer vice president Debbie Nix testified to having seen Union organizer Claudia Juarez holding a clipboard and highlighter during both morning and afternoon voting sessions, contrary to the hearing officer's report. (2) With respect to the electioneering and list-keeping objections, the hearing officer recited Nix's statement that every employee who walked into the Employer's facility on the day of the election entered on the Templeton Street side and walked by Juarez. Other credited testimony and Nix's own clarifications show that this was not so. Nothing, however, turns on this: the hearing officer did not base any credibility or factual findings on the overbroad portion of Nix's testimony, and we resolve the pertinent objections based on the Union organizers' distance from the polling place, which is undisputed. (3) With respect to the Employer's objections to supervisor Rosa Urbina's prounion conduct, the hearing officer found that "it is unclear if [employee Denecia Martir] Cruz asked Urbina for permission to leave early" for a union meeting or if Urbina gave her permission unsolicited. Having reviewed the record, we agree with the Employer that Urbina's offer was unsolicited. Given the Employer's failure to show that the incident occurred within the critical period, however, the question of who initiated the discussion is not determinative.

The Employer operates the nursing and rehabilitation facility at issue, whose nursing assistants and other aides and assistants sought Union representation. The representation petition giving rise to this election was filed on June 3, 2009.[3] As stated above, the Union won the July 7 election by a 40-vote margin, and the Employer filed objections. The hearing officer grouped those objections as follows: (1) electioneering and list-keeping by Union organizers during polling (Objections 2, 3, 4, and 9); (2) prounion conduct by a supervisor during the union campaign (Objections 5, 7, and 8); and (3) threats and intimidation by employees during the union campaign (Objection 1).

As the hearing officer stated, we do not lightly set aside the results of a Board-supervised election, and the burden is on the objecting party - here, the Employer - to demonstrate that objectionable conduct occurred and that it reasonably tended to have a material effect on the outcome of the election. *Oak Hill Funeral Home & Memorial Park*, 345 NLRB 532, 536 (2005); *Antioch Rock & Ready Mix*, 327 NLRB 1091, 1092 (1999).

1. We adopt the hearing officer's analysis and overruling of the electioneering objections under *Milchem, Inc.*, 170 NLRB 362 (1968), and *Boston Insulated Wire &*

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[3] All dates are in 2009 unless otherwise stated.

Cable Co., 259 NLRB 1118 (1982), enfd. 703 F.2d 876 (5th Cir. 1983).[4] Regarding the Employer's reliance on *Peerless Plywood*, 107 NLRB 427 (1953), we agree with the hearing officer that it is not applicable as the Union organizers were not shown to be making election speeches to massed assemblies; however, we also find that employees' participation was not shown to be on company time and was in no way mandatory.[5]

2. We adopt the hearing officer's conclusion that Union organizer Claudia Juarez did not engage in objectionable conduct by creating a list of employees during the polling. Neither Nix nor any other witness established that Juarez had a list of voters on her clipboard, let alone that she consistently checked off

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[4] Regarding *Boston Insulated Wire*, the hearing officer found that there was no electioneering in violation of the Board agent's instructions because Juarez was not in or around the polling area. We find that Juarez also did not violate the Board agent's instruction not to campaign directly to people walking to the polls. Even assuming that the conversations outside the building constituted campaigning, the Employer has not shown that employees approaching the building were actually on their way to the polling place.

[5] The Employer appears to have abandoned its argument that Juarez' conduct was also objectionable under *Performance Measurements Co.*, 148 NLRB 1657 (1964), but in any event, that case involved materially different facts.

their names as they approached.[6] But even if we were to assume that Juarez was checking off a list of employees' names, list-keeping objections typically involve election observers keeping a list of *voters* within the polling place. Juarez' distance from the polling place and her inability to see who entered it made it impossible for her to determine who was a voter and negates any inference that employees reasonably could have thought she was making a list of employees who voted.[7]

3. In adopting the hearing officer's overruling of the Employer's objections alleging prounion conduct by supervisor Rosa Urbina, we emphasize that it is the Employer's obligation, as the objecting party, to

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[6] There was no testimony that any employee witnessed any checking-off motions by Juarez. Cf. *Masonic Homes of California*, 258 NLRB 41, 48 (1981) (as to observers, list-keeping is objectionable only "if employee voters know, or reasonably can infer, that their names are being recorded.")

[7] The Employer argues in the alternative that employees would believe Juarez was making a list of employees who were unwilling to hear her alleged electioneering, for purposes of later retaliation. In so arguing, however, the Employer relies entirely on speculation, not on evidence. The Employer offers no basis for finding that reasonable employees, pre-election, could have believed Juarez was creating an "enemies list." Employee Cruz' testimony that, several weeks after the election, she was told about a list of nonsupporters of the Union does not support the objection, because this post-election information could not have affected employees' free choice at the time of the election. *Mountaineer Bolt*, 300 NLRB 667 (1990).

demonstrate that the objected-to conduct occurred during the critical period. *Accubuilt, Inc.*, 340 NLRB 1337, 1338 (2003). The Employer has not done so here.

The critical period began on June 3. Cruz testified that Urbina made an unsolicited offer for Cruz to leave work early to attend a union meeting in "late May or early June," which is not sufficient to demonstrate with certainty that it was within the critical period. Under *Accubuilt*, supra, uncertainty about whether the conduct occurred during the critical period provides a basis for overruling the objection.[8]

Cruz testified that Urbina had made other statements in favor of the Union. The hearing officer appears to have implicitly discredited this testimony, as she found that Urbina engaged in no prounion conduct other than offering to let Cruz leave early for the Union meeting. But even assuming Urbina made those statements, Cruz gave no time frame for those remarks. Thus, the Employer failed to show they were made during the critical period.

4. The Employer also failed to show that alleged threats and intimidation by coworkers occurred during the

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[8] Because Urbina's prounion conduct was not shown to have occurred during the critical period, we need not assess whether it was objectionable as a substantive matter.

critical period. As the hearing officer found, many of the employee comments on which the Employer relies are not objectionable under Board precedent.[9] We are thus left with three statements: (1) coworker Ramirez' threat to beat up Cruz in late May or early June; (2) an unspecified person's warning to employee Guadalupe Garcia, at an unspecified time, that "something could happen to [Garcia's] car";[10] and (3) a statement in an anonymous phone call, made at an unspecified time, to employee Florita Briseno's daughter that her mother was "going to be in a lot of trouble."[11]

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[9] The hearing officer properly relied on Board precedent that, during contested campaigns, "[a] certain measure of bad feeling and even hostile behavior is probably inevitable." *Cal-West Periodicals*, 330 NLRB 599, 600 (2000). Name-calling and general rudeness are not objectionable threats. *Corner Furniture Discount Center, Inc.*, 339 NLRB 1122, 1124 fn. 6 (2003); *Teamsters Local 299 (Overnite Transportation Co.)*, 328 NLRB 1231, 1231 fn. 2 (1999). We further agree with the hearing officer's conclusion that the employees could disregard threats of job loss made by their coworkers because they understand that the coworkers and the Union are unable to carry out such threats. *Duralam, Inc.*, 284 NLRB 1419, 1419 fn. 2 (1987), and cases cited therein.

[10] Contrary to the hearing officer, we do not find that the use of "could," rather than "would," precludes this statement from being considered a threat. We do, however, agree with the hearing officer that the record lacks necessary evidence about the statement's context, timing, and possible repetition.

[11] The hearing officer did not address the statement regarding Briseno, perhaps because of its vagueness. We do not condone anonymous phone calls that scare children, and we analyze this statement as a threat, despite its vagueness, in order to give the Employer's

The absence of evidence demonstrating that these statements were made during the critical period is fatal to the Employer's reliance on them.[12] *Accubuilt*, supra. The Employer has not established the existence of a general

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objection thorough consideration. Nonetheless, as discussed, we find the evidence insufficient to demonstrate that the statement was objectionable.

[12] Contrary to the Employer's contention that the hearing officer failed to consider the aggregate effect of the allegedly objectionable conduct, no threatening or intimidating conduct was shown to have occurred during the critical period, and therefore there is no aggregate conduct to consider.

We do not reach the Employer's belated contention that the filing date of an earlier petition, filed on May 21 but withdrawn on June 5, should be considered as the start of the critical period. The Employer first asserted this argument in its exceptions brief, long after the hearing record closed, and the supporting documents it attaches to its brief were not offered as evidence at the hearing. By rule, those documents are not part of the record. NLRB Rules and Regulations § 102.69(g)(1)(i). Even if we were to view the Employer's argument on this issue as a motion to reopen the record and admit the attached documents, the Employer has not shown extraordinary circumstances justifying its failure to present the withdrawn petition sooner. NLRB Rules and Regulations § 102.48(d)(1). Even if we considered and agreed with the argument to expand the critical period it would be of no avail. Ramirez' threat to Cruz and supervisor Urbina's offer to release Cruz from work to attend a union meeting are the only acts that would clearly fall within the earlier critical period urged by the Employer. That conduct is insufficient to warrant setting aside the election results

atmosphere of fear and reprisal under *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984).[13]

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for SEIU, Service Employees International Union, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time certified nursing assistants (CNAs), restorative nursing assistants (RNAs), activities assistants, dietary assistants, housekeepers, laundry aides, maintenance employees, and central supply employees employed by the Employer at its facility located at 6425 Miles Avenue, Huntington Park, California; excluding all other employees, LVN's, professional employees, social services employees, medical records employees, guards and supervisors as defined in the Act.

Dated, Washington, D.C., **September 23, 2010.**

Wilma B. Liebman, Chairman

Mark Gaston Pearce, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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[13] Nor is there any basis for finding the third-party employee conduct attributable to the Union and therefore applying the party standard.